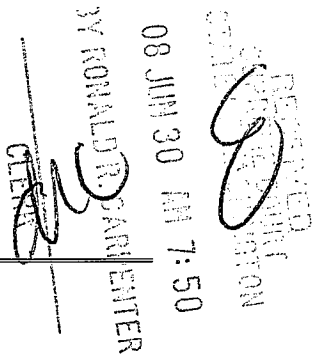
Supreme Court No. 200,569-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

A. MARK VANDERVEEN,

Lawyer (Bar No. 18616).



ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION

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APPENDICES

I. COUNTERSTATEMENT OF THE ISSUE

Respondent A. Mark Vanderveen accepted $20,000 cash that he believed to be illegal proceeds from a major drug ring, then intentionally failed to report the cash to federal authorities, although he knew that he was required to do so. The Disciplinary Board recommended disbarment. Should the Court affirm the Board's recommendation, given Vanderveen's felony conviction, the presumptive sanction of disbarment, the lack of significant mitigating factors and the impact that such convictions have on the image of the profession and the public's confidence in the legal profession?

II. COUNTERSTATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

1. Background

On February 28, 2005, federal law enforcement officials seized approximately 169 kilograms of cocaine that Wesley Cornett, who was part of a major drug ring, had just delivered to another member of the drug ring. TR 16-17.[1] The next day, they seized a trailer containing more than 450 pounds of packaged marijuana belonging to the drug ring. Findings

[1] Bar file documents are designated as "BF" followed by the number at which the document is docketed in the bar file. Hearing exhibits are designated as "EX" followed by the exhibit number. The transcript of the hearing proceedings is designated as "TR" followed by the page citation to the transcript. Rule 12.6 of the Rules For Enforcement of Lawyer Conduct ("ELC").

of Fact, Conclusions of Law and Recommendation ("FFCL") ¶4.[2] That day, then-lawyer James White asked Vanderveen to represent Cornett, who had just been arrested by federal law enforcement officials. FFCL ¶¶4-5. At the time, White was representing Robert Kesling, one of the top men in the drug ring, and Cornett's superior. TR 48-49, 65-66.

2. The Cash Payment

White paid Vanderveen $20,000 cash in two installments for Vanderveen's representation of Cornett. TR 140-41. On March 17, 2005, White left the first cash payment of approximately $10,000 in a paper bag on a chair in the court chambers at Edmonds Municipal Court, where both White and Vanderveen sat as *pro tem* judges. TR 140-41. White gave Vanderveen the remainder of the $20,000 cash within a couple of weeks. TR 141.

Vanderveen was aware that it was "very likely" that the cash he received from White was drug proceeds. TR 492. Indeed, according to Vanderveen, White had told him "the people [Cornett] works with have given me some money, and I can pass it on to you." TR 346. In a recorded conversation between Cornett and Kesling, Kesling referred to having put down $150,000 for the lawyers. EX 5B at 15.

Vanderveen's ordinary business practice with regard to receipt of

[2] The Hearing Officer's FFCL are attached as Appendix A, and are at BF 47.

legal fees in the form of cash was to (1) take it to the bank on the same day he received it, placing the fees in his business bank account, (2) photocopy the cash payments so that he would have a record, and (3) enter the payment in his QuickBooks accounting system within a day or two. TR 141-42, 458. But he did not follow his ordinary practices here. Instead, Vanderveen placed each of the two cash payments in his home safe. TR 142. Unlike his ordinary practice of making immediate QuickBooks and photocopy records regarding the receipt of cash, Vanderveen failed to record the $20,000 in cash from White when he received it. TR 142; 505.

3. Vanderveen's Representation of Cornett

In exchange for the $20,000 cash that he received from White, Vanderveen represented Cornett for several weeks beginning in early March 2005. During that time, Vanderveen repeatedly acceded to requests from White, on behalf of drug boss Kesling, to help them get information about or from Cornett. For example, at White's request, Vanderveen encouraged Cornett to meet with Kesling face-to-face to discuss a trailer full of marijuana that had gone missing.[3] At times, Vanderveen passed messages, through White, from Cornett to Kesling. After one meeting with Cornett, Vanderveen helped White conduct surveillance of Cornett.

[3] This "missing" trailer was a trailer of marijuana that had been seized by federal agents on March 1, 2005, after Cornett had decided to cooperate and informed them of its existence.

And Vanderveen encouraged Cornett to go along with the drug organization's demand that Cornett take a polygraph examination to help them determine what had happened to the missing trailer of marijuana.

On March 3, 2005, Vanderveen met with Cornett for the first time. Unknown to Vanderveen, Cornett had agreed to assist the federal authorities in investigating Kesling's drug ring by meeting with Kesling in an undercover role, acting as if he were still a part of the drug ring. TR 20-21; FFCL ¶6. During this initial meeting, Cornett informed Vanderveen that, when he was picked up by law enforcement authorities, he was questioned for a number of hours and then released without being charged, but did not tell Vanderveen that he was cooperating with law enforcement. During that meeting, Vanderveen told Cornett that Cornett did not have to worry about paying Vanderveen, it was taken care of with money that White had received from "Mr. Cornett's friends or associates." TR 55-56.

On March 8, 2005, Vanderveen had his second meeting with Cornett, which was recorded by federal law enforcement officials.[4] By the time of this second meeting, Vanderveen had learned from White that a trailer containing a large amount of marijuana and/or cash had been

[4] By this time, law enforcement agents had obtained federal court approval to monitor and record the meeting. TR 24.

removed from a Woodinville location that only Cornett and Kesling knew about. TR 61-63, 74. By this time, Vanderveen had learned from White that White was concerned that either Cornett had taken the trailer himself or that Cornett was cooperating with law enforcement. TR 61-62, 74.

During the second meeting, Vanderveen probed Cornett repeatedly for information about the missing trailer of marijuana that was supposed to be in the barn. EX 2B; TR 68. He told Cornett:

> If there's drugs in the barn – I don't know what the barn is. I assume it's some place that drugs are being sold or – or stored, rather. And my understanding is that that can be cleared out, which is, you know, fine if that's what needs to happen . . . .

EX 2B at 2; TR 68-69. During his testimony at hearing, Vanderveen denied that he was advising Cornett that evidence of a crime could be destroyed, but instead claimed that he was telling Cornett that Cornett "shouldn't go back there [to the barn]," and that he was referring to others, not Cornett, clearing out the barn. TR 70-71.

As of March 8, 2005, Vanderveen had agreed to assist White in conducting surveillance of Cornett. FFCL ¶13; TR 66. Before he met with Cornett that day, Vanderveen informed White of Cornett's whereabouts so that White could follow Cornett after Cornett left Vanderveen's office, FFCL ¶13, TR 511-512, and Vanderveen did so without Cornett's knowledge or approval. TR 83-84. At the time,

Vanderveen was aware that White and Kesling were concerned that Cornett had taken the trailer or was cooperating with law enforcement. TR 62, 74, 523. Vanderveen understood, from both Cornett and White, that Kesling – who was both Cornett's boss and White's client – was violent and dangerous. TR 90, 94. When Cornett left Vanderveen's office, Vanderveen telephoned White to notify him, and White followed Cornett. TR 26-28, 83-84. Cornett realized he was being followed, and eluded White. TR 26-28.

When questioned at hearing about how he could justify having Cornett followed by someone who was representing his client's drug-dealing boss, Vanderveen admitted that he "didn't think [the surveillance] was a great plan," TR 424, but testified that he agreed to the surveillance to determine whether some non-government person was following Cornett, theorizing that someone who had taken the trailer was following Cornett to hurt him. TR 535-36. Vanderveen justified his decision to keep his client in the dark about the surveillance by claiming that he had relented to White. He stated that White "convinced me that if I told Wes Cornett what was going on, when [Cornett] went out he'd act strangely." TR 423, 522-23. However, Vanderveen had already advised Cornett that he was probably being followed. TR 55, 522-23.

Also at White's request, TR 85, 87, during telephone conversations

with Cornett that occurred later on March 8, 2005 and on March 9, 2005, Vanderveen encouraged Cornett to meet with Kesling at White's office, indicating that Cornett should be safe there. TR 89, 248-49; EX 3B, 4B. Although Vanderveen testified at hearing that he was against Cornett meeting with Kesling, TR 88, 381-82, 524, the recorded conversations indicate that he encouraged Cornett to meet with Kesling. EX 3B at 2, 7-8; TR 89.

On March 9, 2005, Cornett met with Kesling at White's office. The meeting was recorded. EX 5B. They discussed the missing marijuana and steps that could be taken to learn more about it. Kesling told Cornett to check out the barn and then call Vanderveen to report. Id. at 52-53, 60-61. Kesling told Cornett to keep communicating through the lawyers, referring to Vanderveen and White. Id. at 60. This was consistent with Vanderveen's understanding that Cornett and Kesling would communicate in this fashion. TR 118-19.

On March 10, 2005, in a telephone conversation, Cornett advised Vanderveen that he had checked out the Woodinville barn, had not seen the trailer and had noticed that a television was missing. EX 6B at 2-3. Cornett also told Vanderveen that he needed help on the $1,900 rent for the barn location. EX 6B at 4. Vanderveen told Cornett that he would pass on a message regarding what Cornett saw and that Cornett needed

rent money, and did so. EX 6B at 7; EX 7B.

At White's request, TR 144-45, 439, in a telephone conversation on March 17, 2005, Vanderveen advised Cornett that Kesling and others wanted Cornett to take a polygraph examination regarding who took the trailer, referring to the missing marijuana. EX 8B. Although Vanderveen testified at hearing that he had initially informed Cornett that he was against the polygraph, TR 441, he said no such thing to Cornett during this initial conversation, or during any of the subsequent recorded conversations. EX 8B, 11B, 12B.

On March 21, 2005, with the polygraph test scheduled to take place the next day, Cornett telephoned Vanderveen. During the conversation, Cornett expressed concern about taking the polygraph examination, indicating that the test is not always accurate, and that there would be "repercussions" from the people who lost the marijuana. EX 11B at 2-3. Cornett asked Vanderveen why it was in his best interest to take the polygraph.

Vanderveen encouraged Cornett to take the polygraph test. EX 11B. Vanderveen did so knowing that the primary purpose of the polygraph test was to help reassure drug dealers about what happened to the missing trailer of marijuana, and having been told by White that in essence Cornett could be in danger from Kesling or other people in the

drug organization ("the people in Canada") if he refused the polygraph test. TR 151-52. Vanderveen did not, at that time, discuss with Cornett that one way to protect Cornett while refusing to take the polygraph test was to call up the law enforcement authorities and offer Cornett's cooperation against Kesling and the other members of the drug ring. TR 164.

Despite the fact that the polygraph test had already been scheduled to occur the next day, EX 9B at 2, during a second telephone conversation later on March 21, 2005, Vanderveen told Cornett that he would hire the polygraph examiner directly, and instruct the polygraph examiner to give the results only to Vanderveen. EX 12B at 2.

The next day, March 22, 2005, Cornett went to the polygrapher's office. FFCL ¶19. Kesling and White were there, but Vanderveen was not. Id. White handed Cornett $400 for Cornett to use to pay the polygrapher. TR 32, 192-93. White then met with the polygrapher outside of the presence of Cornett and Kesling. When White returned a few minutes later, he informed Cornett and Kesling that the polygrapher was not willing to administer the polygraph. EX 13B at 17.

During a telephone conversation the next day, March 23, 2005, Vanderveen told Cornett that the polygraph test would be rescheduled. EX 14B at 3. Then, on March 28, 2005, in a conversation that was not

recorded because of technical difficulties, Cornett indicated to Vanderveen that he did not want to take the polygraph. TR 191. Vanderveen said that he would talk to White about it. TR 191-92.

After checking with White, Vanderveen spoke to Cornett again on March 28, 2005. EX 16B at 2. He told Cornett that he had spoken to White. Vanderveen stated that Kesling trusts Cornett completely, but "some guys" up in Canada still want the polygraph to be administered. Id. Vanderveen said he would defer to Cornett. Cornett said he would not take the polygraph. Id.

A few days later, on April 4, 2005, Cornett called Vanderveen to get advice on Kesling's proposal that Cornett go to Mexico so as to be difficult for law enforcement to locate. EX 18B at 2. Again, Vanderveen indicated that he would talk to White before he gave Cornett advice. Id. at 3. After checking with White, TR 454, Vanderveen advised Cornett not to go to Mexico. EX 19B at 2, 6. After that, Vanderveen's representation of Cornett essentially became inactive. TR 430.

4. Vanderveen's Arrest, Guilty Plea and Sentence

In early May 2005, federal agents arrested Kesling on drug charges. When White appeared in federal court on May 10, 2005 to represent Kesling at arraignment, federal prosecutors pulled White aside and informed him that he too was the subject of the criminal investigation.

TR 218, 506-07. Several days later, White agreed to assist law enforcement agents in their ongoing investigation and had a recorded conversation with Vanderveen on May 14 or 15, 2005, at least four days after White first learned that he (and presumably Vanderveen as well) could face problems as a result of the criminal investigation. EX 126A.

On July 22, 2005, Vanderveen was charged by Information filed in United States v. A. Mark Vanderveen, Cause No. CR05-0283JCC (W.D. Wash.) with the felony crime of willful failure to file a currency transaction report (form 8300), in violation of 31 U.S.C. §§ 5331(a) and 5322.[5] EX 20. He entered a guilty plea under penalty of perjury that day. TR 202; EX 21.

Following his guilty plea, there was extensive press coverage about Vanderveen's criminal conviction, his involvement with the Kesling drug ring, and his sentence. TR 202-06; EX 28-46.

Seeking leniency at his criminal sentencing on December 2, 2005, Vanderveen – through his counsel in the criminal case – told the sentencing judge that he was remorseful and was agreeing to be disbarred. TR 500-01; EX 47. This representation to the court was reported in the press. EX 43. The court imposed a sentence of three months in prison, to be followed by three months of home detention. EX 22.

[5] The text of 31 U.S.C. §§ 5331(a) and 5322(a) is attached as Appendix C.

After Vanderveen served his prison term, he was required to wear an ankle bracelet while on home detention for 90 days. On the last day of his home detention, Vanderveen asked his probation officer for permission to cut off his ankle bracelet, and the probation officer denied his request. TR 484-85. Vanderveen, in disregard of the court's sentence and his probation officer's direction, nonetheless chose to cut off his ankle bracelet and go for a bicycle ride prior to the conclusion of his home detention. TR 485. The court sentenced Vanderveen to six additional days in prison and 30 additional days of home detention for refusing to comply with the terms of his home detention. TR 485; EX 23.

B. PROCEDURAL FACTS

Vanderveen pleaded guilty on July 22, 2005. TR 202; EX 20-21. On July 27, 2005, the Washington State Bar Association ("Association") filed disciplinary charges against him. BF 1. In January 2006, after Vanderveen was sentenced in his criminal case, the Association filed the First Amended Formal Complaint. BF 13. Vanderveen asserted his Fifth Amendment privilege in his answer to the amended formal complaint in January 2006, and continued to do so until October 2006, nearly a year after his criminal sentencing, when he filed an Amended Answer to the First Amended Formal Complaint. BF 14, 26.

The disciplinary hearing occurred over five days in January 2007.

On April 5, 2007, the Hearing Officer issued an oral ruling. BF 42. On July 3, 2007, the Hearing Officer filed his FFCL. BF 47. The Hearing Officer found that Vanderveen's crime of not reporting the $20,000 cash violated Rules 8.4(b) and 8.4(c) of the Rules of Professional Conduct ("RPC"), as charged in Count 5 of the First Amended Formal Complaint. The Hearing Officer did not find the violations charged in Counts 1 through 4, relating to other federal crimes and conflicts of interest.

The Hearing Officer found that disbarment was the presumptive sanction, FFCL ¶37, but recommended a three-year suspension based primarily on a "mitigating factor" related to the fact that Vanderveen was convicted by guilty plea and a mitigating factor of character or reputation. FFCL ¶¶29, 40, 44. On appeal to the Disciplinary Board, the Association challenged the Hearing Officer's recommendation to depart downward from the presumptive sanction. The Board modified the Hearing Officer's FFCL, eliminating two unsupported mitigating factors, and recommended disbarment by a vote of 10 to 1. Disciplinary Board Opinion ("Board Op.").[6]

III. ARGUMENT

A. STANDARD OF REVIEW

In reviewing a decision of the Disciplinary Board, the Court will

[6] The Disciplinary Board Opinion is attached as Appendix B, and is at BF 59.

give great weight to the hearing officer's findings of fact. In re Disciplinary Proceeding against Poole, 156 Wn.2d 196, 208, 125 P.3d 954 (2006); see also In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003). A party cannot challenge the evidentiary support for the findings to which he objects by rearguing his version of the facts or the inferences to be drawn from the facts. Poole, 156 Wn.2d at 212; Kagele, 149 Wn.2d at 814; In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 861, 64 P.3d 1226 (2003). This Court will not disturb findings of fact made on conflicting evidence, and it will uphold findings of fact that are supported by substantial evidence. Poole, 156 Wn.2d at 208-09; In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58, 61, 93 P.3d 166 (2004). "Substantial evidence" is "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." Poole, 156 Wn.2d at 209 n. 2 (citations omitted).

The Court reviews conclusions of law de novo, and it will uphold those conclusions if they are supported by the findings of fact. Guarnero, 152 Wn.2d at 59; Poole, 156 Wn.2d at 209; In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 404, 98 P.3d 477 (2004). It also reviews sanction recommendations de novo, but generally affirms the Disciplinary Board's sanction recommendation unless it "can articulate a specific

reason to reject" it. Guarnero, 152 Wn.2d at 59 (quotations omitted). And, where the sanction recommendations of the hearing officer and Disciplinary Board differ, the Court gives greater weight to Board because "the Board is the only body to hear the full range of disciplinary matters and has a unique experience and perspective in the administration of sanctions." In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 754, 82 P.3d 224 (2004) ("Cohen II") (quotations and citations omitted).

B. DISBARMENT IS THE PRESUMPTIVE SANCTION FOR VANDERVEEN'S CRIME OF DISHONESTY.

Disbarment is the presumptive sanction for Vanderveen's affirmative decision not to report the $20,000 cash he received. As conclusively reflected in his guilty plea, Vanderveen acted willfully, with both the knowledge of the reporting requirement and a specific intent to commit the crime, when he failed to file a "Report of Cash Payments Over $10,000 Received in a Trade or Business" with regard to the $20,000 cash White paid him to represent Cornett, in violation of 31 U.S.C. §§ 5322 and 5331.

Section 5331(a) requires persons in a trade or business, such as lawyers, to report the receipt of more than $10,000 cash in one transaction (or two related transactions) in connection with that trade or business. See Appendix C. The report is made to the Financial Crimes Enforcement

Network. Section 5322(a) makes it a felony for a person to "willfully" violate the reporting requirement.[7] Id.

Vanderveen's crime is not a tax offense. Rather, it is a crime of thwarting law enforcement efforts. Required reports regarding large cash transactions are designed to assist law enforcement in the detection of criminal activity. "Since individuals engaging in sizeable cash transactions often are involved in criminal activity, reports filed pursuant to this requirement assist the government in its efforts to investigate and combat a wide range of criminal conduct." United States v. Scanio, 900 F.2d 485, 487 (2d Cir. 1990) (citations omitted). Indeed, Vanderveen's statute of conviction (31 U.S.C. § 5331) was passed in October 2001 as a part of anti-terrorism legislation, the USA Patriot Act. Pub. L. No. 107-56, tit. III, § 365(a), 115 Stat. 333 (2001).

Under the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) ("ABA Standards"), ABA Standard 5.11 applies to Vanderveen's crime. It states:

> 5.11 Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional

[7] Section 5322(a) also applies to other reporting requirements set forth in Title 31, such as the requirement that banks report cash transactions exceeding $10,000 (§ 5313(a)) and the requirement that persons not "structure" cash deposits to financial institutions, making multiple cash deposits totaling more than $10,000, with no single deposit exceeding $10,000 (§ 5324(a)).

> interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
>
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

(emphasis added). The Hearing Officer and Disciplinary Board properly found that this presumptive standard applied here.[8] FFCL ¶37.

1. Under Ratzlaf, Vanderveen's Criminal Conviction Establishes Both That He Knew of the Reporting Requirement and That He Specifically Intended Not to Report the $20,000 Cash.

Vanderveen's criminal conviction establishes conclusively that he knew of the reporting requirement and intended not to report the $20,000 cash payment that he received as his legal fee from the lawyer for one of the high-level members of a large drug organization. Vanderveen pleaded guilty, under penalty of perjury, to having "willfully" failed to file a currency transaction report. See 31 U.S.C. §§ 5322(a), 5331(a); EX 21; Fed. R. Crim. P. 11.

The United States Supreme Court has long held that "willfully" within the meaning of § 5322(a) requires that a defendant both know of a

[8] On appeal to the Disciplinary Board, Vanderveen did not challenge this conclusion of law. BF 56. On appeal here, Vanderveen assigns error to this conclusion. Opening Brief of Respondent Vanderveen ("BR") 1, 13-17.

cash reporting requirement and intentionally fail to file the report. Ratzlaf v. United States, 510 U.S. 135, 141, 114 S.Ct. 655 (1994). Section 5322(a) applies not only to 31 U.S.C. § 5331, but also to 31 U.S.C. § 5324(a), which prohibits persons from "structuring" cash deposits to financial institutions, making multiple cash deposits totaling more than $10,000, with no single deposit exceeding $10,000. See Appendix C. Vanderveen argues that the Ratzlaf holding applies only to structuring cases, and that willfulness under § 5322(a) means something entirely different when applied to his case than it does when applied to a structuring case. BR 15-16. He cites no authority in support of his argument, because there is none.

The Ratzlaf Court did not limit its holding to structuring cases. It held that with regard to the reporting requirements in Title 31 of the United States Code, Congress had determined that knowledge of the reporting requirement was an essential element, thus making ignorance of the law a defense "with respect to 31 U.S.C. § 5322(a) and the provisions it controls." 510 U.S. at 149 (emphasis added). Respondent's empty argument ignores the Supreme Court's principle of construction as spelled out in Ratzlaf – "We have even stronger cause to construe a single formulation, here § 5322(a), the same way each time it is called into play." Id. at 143. It also blithely sidesteps the Court's recognition that "§

5322(a)'s omnibus 'willfulness' requirement, when applied to other provisions in the same subchapter, consistently has been read by the Courts of Appeals to require both 'knowledge of the reporting requirement' and a 'specific intent to commit the crime, ' i.e., ' a purpose to disobey the law.'" Id. at 141. The Ratzlaf Court cites approvingly to two such Court of Appeals cases, which interpret willfulness under § 5322 as applied to the reporting requirements of § 5313 (a similar reporting statute to § 5331, applicable to financial institutions), not the structuring provision of § 5324.

The meaning of "intentional" under the ABA Standards fits perfectly with the mental state required for Vanderveen's criminal conviction. The ABA Standards define "intentional" as having "the conscious objective or purpose to accomplish a particular result." ABA Standards at 6. As set forth in Ratzlaf, the mental state required for conviction under 31 U.S.C. § 5331(a) includes "both knowledge of the reporting requirement and a specific intent to commit the crime." BF 42 at 24 (emphasis added); FFCL ¶ 40.

Thus, the Disciplinary Board properly concluded that Vanderveen acted intentionally in failing to report the $20,000 cash he received to represent Cornett.

2. ELC 10.14(c) Bars Vanderveen's Argument That He Did Not Know of the Reporting Requirement.

As he did below, Vanderveen asks this Court to ignore the mandate of ELC 10.14(c) by considering his claim that he did not know of the reporting requirement, despite his guilty plea under penalty of perjury. He cites no authority to support his position. Neither the Hearing Officer nor the Disciplinary Board accepted this argument, nor should this Court.

ELC 10.14(c) provides:

> **(c) Proceeding Based on Criminal Conviction.** If a formal complaint charges a respondent lawyer with an act of misconduct for which the respondent has been convicted in a criminal proceeding, the court record of the conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on which the conviction was based.

ELC 10.14(c) conclusively establishes that Vanderveen acted intentionally, since his intentional state of mind was an essential element of his crime.

In the recent case of In re Disciplinary Proceeding Against Perez-Pena, 161 Wn.2d 820, 830, 168 P.3d 408 (2007), this Court held that the lawyer's criminal conviction provided conclusive evidence of his guilt on an assault charge under ELC 10.14(c), despite his hearing testimony that he did not touch the victim. It quoted the American Bar Association's comments to the Model Rules for Lawyer Disciplinary Enforcement ("Model Rules"), as follows:

> The issue to be determined in a disciplinary proceeding predicated upon the finding of guilt of a lawyer for a crime is whether the conduct established by the determination of guilt and subsequent conviction warrants discipline, and if so, the extent of discipline to be imposed. The respondent may offer evidence of mitigating circumstances not inconsistent with the essential elements of the crime whose existence is conclusively established by the finding of guilt.

Id. at 831 (emphasis added).

ELC 10.14(c) and case law forbid a lawyer from disputing essential facts regarding the criminal conviction. See In re Disciplinary Proceeding Against Plumb, 126 Wn.2d 334, 338-39, 892 P.2d 739 (1995); In re Disciplinary Proceeding Against Curran, 115 Wn.2d 747, 759-60, 801 P.2d 962 (1990). Vanderveen suggests that ELC 10.14(c) applies only to preclude him from challenging essential facts for purposes of determining RPC violations, and not from challenging those same facts for purposes of imposing sanction. See BR 19. Such a rule makes no sense.[9]

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[9] The American Bar Association, in its comments to the Model Rules, notes:

> Proof of guilt must be more convincing in a criminal case than in a disciplinary proceeding. Thus, the respondent found guilty under the higher standard in the criminal case should not be able to relitigate the issue of guilt in the course of a disciplinary proceeding with its relatively lower standard of proof.
>
> Moreover, practical difficulties stand in the way of relitigating guilt. Witnesses may be reluctant to cooperate again; some may have died following the conclusion of the criminal case; others may be outside the jurisdiction of the agency. In those situations the testimony of the respondent proclaiming innocence would for all practical purposes stand uncontroverted if the issue of guilt could be relitigated.

Model Rules for Lawyer Disciplinary Enforcement 50 (ABA 1996).

Not only would it undermine the economy of resources inherent in ELC 10.14(c), but it would also permit blatant inconsistencies that would diminish public confidence in the disciplinary system.

Vanderveen fails to mention the controlling authority on this issue. In Plumb, this Court made clear that a convicted lawyer may not challenge facts necessary to the criminal conviction. Plumb, 126 Wn.2d at 339. In that case, a lawyer had been convicted of theft resulting from his failure to report earnings while receiving welfare benefits. On appeal he sought to have the Court consider evidence regarding his failure to report earnings that had necessarily been rejected by the jury that convicted him. Id. Because the only legal issue on appeal there was the sanction to be imposed, id. at 337, the Court's rejection of Plumb's factual argument – because it was contrary to facts necessary to support his conviction – occurred in the context of determining sanction. Accordingly, the Plumb case implicitly rejected the argument that a lawyer can contradict a fact for the purpose of determining a disciplinary sanction that has been conclusively established for the purpose of determining a disciplinary violation.

3. Substantial Evidence Supports the Findings of the Hearing Officer and Disciplinary Board That Vanderveen Acted Intentionally. They Were Not Required To Credit His Assertion That He Had No Knowledge of the Reporting Requirement.

Both the Hearing Officer and the Disciplinary Board found that Vanderveen acted intentionally. FFCL ¶¶30, 36; Board Op. 5. Thus, they rejected his claim that he did not even know of the reporting requirement. Ample evidence supports their finding of intent.

First, and foremost, the evidence established that Vanderveen entered a guilty plea, under penalty of perjury, to having willfully failed to report the $20,000 cash fee he received.[10] EX 20-21; TR 202. Neither the Hearing Officer nor the Disciplinary Board was required to ignore this evidence simply because Vanderveen now claims otherwise. See In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 331, 157 P.3d 859 (2007) (refusing to "overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board"); Poole, 156 Wn.2d at 212 (same).

Since ELC 10.14(c) conclusively establishes that Vanderveen had the conscious objective or purpose to avoid filing the cash report, the

[10] Significantly, Vanderveen has never suggested that he misunderstood the "willfulness" requirement at the time he entered his guilty plea. TR 473. Instead, despite the fact that his guilty plea was entered under penalty of perjury, Vanderveen argued in summation that his guilty plea was a "legal fiction" designed to allow him to take a plea deal that he found to be advantageous despite his innocence of the crime charged. TR 603, 656-57, 683, 685-86.

Association had no reason to further investigate, or further prove, Vanderveen's mental state at hearing. Nonetheless, other evidence did support the finding of intentional conduct.

The record reveals that:

- Vanderveen was an experienced practitioner in criminal law. TR 49.

- Rather than receiving one or more checks from White, Vanderveen received the $20,000 in two cash payments, one delivered in a paper bag left on a chair and one delivered in a parking lot outside a bank. TR 140-41; 468-69.

- In addition to failing to report the $20,000 in cash, Vanderveen took steps to hide the funds by placing each of the two cash payments in his home safe rather than the bank, which would have its own obligation to report, and by failing to make records of each of the two cash payments. TR 141-42, 458, 505.

- At the same time that Vanderveen received the $20,000 cash and failed to report it, he was aware of the reporting requirement. On or about March 22, 2005, White told Vanderveen that White had been offered a million dollars to serve as advisor to some of the top people in the drug ring ("the people in Canada"). TR 168. Vanderveen told White that it would be illegal to take money like that since it would obviously not be reported. TR 169.

- Vanderveen entered his guilty plea, represented by able criminal defense counsel, under the penalty of perjury, specifically representing that he was, in fact, guilty of the offense to which he was pleading guilty. EX 21.

In his hearing testimony, Vanderveen attempted to dodge the inevitable effect of his criminal conviction by testifying that he had no

idea that he was required to file a cash report regarding the $20,000 cash he received as payment of legal fees. TR 461, 467. The Hearing Officer chose not to credit this claim in his findings, and expressed skepticism about its veracity.[11]

In his brief, Vanderveen cites to highly disputed evidence in the form of a recorded conversation (EX 126A) that occurred between Vanderveen and White four or five days after White learned that White was the subject of an ongoing grand jury investigation into the Kesling drug ring for his conduct in, among other things, failing to report the cash he received from Kesling and passed on to Vanderveen.[12] BR at 7-8; TR 218, 506-07. He offered this tape recording at hearing in order to bolster his own testimony claiming that he was unaware of the reporting

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[11] In delivering his oral ruling, the Hearing Officer commented:

> Usually you would think that a guy in practice as long as Mr. Vanderveen was in practice by the time these problems started would know all about reporting $10,000 in cash receipts. Whether he did or didn't, I really don't care. I don't have to conclude one way or another. . . . [H]e can't attack his conviction by trying to go behind and explain away the elements; he's convicted of what he's convicted of.

BF 42 at 25-26. The Hearing Officer also commented, "I don't know whether a jury or a judge would have found a specific intent to commit the crime in this case, and it's somewhat irrelevant ...." Id. at 28.

[12] When White appeared in federal court on May 10, 2005 to represent Kesling at arraignment, federal prosecutors pulled White aside and informed White that he was also the subject of the criminal investigation. TR 218, 506-07. Several days later, White agreed to assist law enforcement agents in their ongoing investigation and had a recorded conversation with Vanderveen on May 14 or 15, 2005, at least four days later. EX 126A.

requirement at the time he received the cash. TR 508. He testified, pointedly, that the recorded conversation was the first time he learned of Kesling's arrest (and thus the first time he became aware that he or White could be in trouble). TR 507-08. However, the recording itself, which was difficult to hear on the equipment used at hearing, TR 416-18, reveals that Vanderveen knew, prior to his self-serving conversation with White, that Kesling had been arrested. See EX 126B.

Neither the Hearing Officer nor the Disciplinary Board was required to give weight to this piece of disputed evidence or to Vanderveen's self-serving contradiction of his guilty plea. A lawyer who challenges the hearing officer's findings must do more than argue his version of the facts while ignoring adverse evidence. Marshall, 160 Wn.2d at 331. He must present argument as to why the specific findings are unsupported, and he must cite to the record to support his argument. Id. Vanderveen has failed to do so here. BR 7-8, 14, 17, 19.

C. VANDERVEEN'S CONDUCT IN INTENTIONALLY FAILING TO REPORT HIS $20,000 CASH FEE VIOLATED RPC 8.4(c).

While Vanderveen concedes a violation of RPC 8.4(b) based on his felony conviction, he nonetheless challenges the unanimous conclusion of both the Disciplinary Board and the Hearing Officer that his intentional

failure to report the $20,000 cash also violated RPC 8.4(c).[13] BR at 18. The Disciplinary Board and Hearing Officer concluded that Vanderveen's conduct constituted "dishonesty," reflecting "untrustworthiness and a lack of integrity." FFCL ¶35; Board Op at 1.

Vanderveen asserts that the Association was required to prove, independently of his criminal conviction, that he acted dishonestly in violation of RPC 8.4(c), but cites no authority for this novel proposition. BR at 18.

> Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken.

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); see In re Disciplinary Proceeding Against Allper, 94 Wn.2d 456, 467, 617 P.2d 982 (1980). Accordingly, this Court may decline to consider this argument.

Vanderveen's argument has no merit. His conviction establishes both a violation of RPC 8.4(b) and a violation of RPC 8.4(c). As discussed above, Vanderveen's conviction established that he failed to report the $20,000 cash that he received for representing an underling in a

[13] On appeal to the Disciplinary Board, Vanderveen did not challenge this conclusion of law. BF 56.

large drug organization, both knowing of his obligation to report it and with the specific intent not to file the report. ELC 10.14(c) establishes a conviction as "conclusive evidence" of misconduct, without limiting itself to violations of RPC 8.4(b). No Washington discipline case suggests otherwise. See, e.g., In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 533, 173 P.3d 915 (2007) (lawyer convicted of child molestation violated RPC 8.4(b) and 8.4(i)); In re Disciplinary Proceeding Against Perez-Pena, 161 Wn.2d 820, 828, 168 P.3d 408 (2007) (lawyer convicted of misdemeanor assault violated RPC 8.4(b) and 8.4(i)); In re Disciplinary Proceeding Against McLendon, 120 Wn.2d 761, 767-68, 845 P.2d 1006 (1993) (lawyer convicted of theft violated RPC 8.4(b) and 8.4(c)).

Moreover, the Hearing Officer found that Vanderveen's conduct constituted "'dishonesty' in that it reflected untrustworthiness and a lack of integrity." FFCL ¶35. This is supported by evidence beyond the felony conviction. With the receipt of each of his two cash payments totaling $20,000, Respondent took actions consistent with hiding the funds rather than follow his ordinary business practice: (1) he failed to take the cash to the bank on the same day he received it, placing the fees in his business bank account, (2) he failed to photocopy the cash payments so that he would have a record, and (3) he failed to enter the payment in his

QuickBooks accounting system within a day or two. TR 141-42, 458; 505. Instead, Respondent placed each of the two payments totaling $20,000 in cash in his home safe. TR 142; 459.

D. THE DISCIPLINARY BOARD PROPERLY RECOGNIZED THAT VANDERVEEN'S UNDISPUTED CONDUCT IN ALLOWING HIS CLIENT TO BE SURVEILLED WAS INCONSISTENT WITH CERTAIN OF THE HEARING OFFICER'S FINDINGS.

In ¶¶25 and 26 of his FFCL, the Hearing Officer indicated that Vanderveen acted appropriately in giving advice to Cornett and communicating with White. Based on Vanderveen's conduct in assisting White in following Vanderveen's client without the client's knowledge, the Board struck finding ¶25, concluding that such conduct was not consistent with action in the best interests of his client.[14] Board Op. at 2-3. Based on that same conduct, the Board also struck a portion of finding ¶26,[15] recognizing that Vanderveen was not always clear or consistent in his understanding that his responsibilities were to his client, Cornett, rather than White, the person who paid the $20,000 cash on behalf of Cornett's

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[14] FFCL ¶25 states:

> Respondent's conduct and advice in regard [to] Cornett and his communications to White were what one would expect from a lawyer who thought Cornett was his client. Respondent did what any lawyer in his position should do acting in the best interests of his client.

[15] FFCL ¶26 states:

> Respondent clearly understood that his responsibilities were to Cornett, and no one else. He demonstrated that fact consistently. . . .

drug boss. Id. at 3-4.

On appeal, Vanderveen argues that it was error for the Disciplinary Board to modify two of the Hearing Officer's findings (FFCL ¶¶25-26) regarding Vanderveen's representation of Cornett. BR 12-13. In so doing, he disregards the fact that the Board's modifications were based on undisputed evidence.

As of March 8, 2005, Vanderveen had agreed to assist White in conducting surveillance of Cornett. FFCL ¶13; TR 66. Before he met with Cornett that day, Vanderveen informed White of Cornett's whereabouts so that White could follow Cornett after Cornett left Vanderveen's office, id., TR 511-512, and Vanderveen did so without Cornett's knowledge or approval. TR 83-84. At the time, Vanderveen was aware that White and Kesling were concerned that Cornett had taken the trailer or was cooperating with law enforcement. TR 62, 74, 523. When Cornett left Vanderveen's office, Vanderveen telephoned White to notify him, and White followed Cornett. TR 26-28, 83-84. Cornett realized he was being followed, and eluded White. TR 26-28.

When questioned at hearing about how he could justify having Cornett followed by someone who was representing his client's drug-dealing boss, Vanderveen admitted that he "didn't think [the surveillance] was a great plan," TR 424, but testified that he agreed to the surveillance

to determine whether some non-government person was following Cornett, theorizing that someone who had taken the trailer was following Cornett to hurt Cornett. TR 535-36. Vanderveen justified his decision to keep his client in the dark about the surveillance by claiming that he had relented to White. He stated that White "convinced me that if I told Wes Cornett what was going on, when [Cornett] went out he'd act strangely." TR 423, 522-23. However, Vanderveen had already advised Cornett that he was probably being followed. TR 55, 522-23.

Based on the substantial undisputed evidence, the Board's modifications were proper.

E. UNDER THE CIRCUMSTANCES OF THIS CASE, DEPARTURE FROM THE PRESUMPTIVE SANCTION IS NOT WARRANTED.

The Disciplinary Board not only concluded that disbarment was the applicable presumptive sanction, but also concluded, in a nearly unanimous decision, that Vanderveen should be disbarred. It found that "[t]he aggravating and mitigating factors do not justify decreasing the sanction from disbarment to suspension," and that the principle of proportionality did not warrant a reduction in sanction since disbarment "is proportional to the sanctions imposed in analogous cases." Board Op. at 5.

1. The Mitigating Factors Do Not Justify A Lesser Sanction.

a. The Board Properly Struck the Hearing Officer's Conclusion of Law That Directly Conflicted With the Hearing Officer's Findings That Vanderveen Acted Intentionally.

The Disciplinary Board struck the Hearing Officer's Conclusion of Law ¶40, in which the Hearing Officer mitigated the presumptive sanction of disbarment to a three-year suspension based on the following reasoning:

> It is essential to understand that *Ratzlaf* held that in order to convict for failure to file Form 8300, the jury must be instructed that they have to find that Defendant not only acted "willfully", i.e. with knowledge of the reporting requirement, but that he also acted with a specific intent to commit the crime. Respondent, however was convicted pursuant to a plea agreement. He was not found guilty after a trial by a jury properly instructed that "willfulness" means both a knowledge of the reporting requirement and a specific intent to not file Form 8300. The plea agreement in Respondent's matter simply states that one element of the crime of failing to file Form 8300 is that the Defendant acted "willfully". The Plea Agreement does not state that "intentionally" is an element of the crime and it does not state that "willfully" is interpreted to include "intentionally". Thus, while Responednt [sic] certainly pled guilty to acting "willfully", he did not plead guilty to acting "intentionally".

FFCL ¶40. The Board determined that this conclusion of law "conflicts directly" with the Hearing Officer's factual findings that Vanderveen acted intentionally. Board Op. at 5; FFCL ¶¶30,36. Vanderveen assigns error to the Board's decision, but fails to present any argument as to why the Disciplinary Board's decision was wrong. BR 1, 13-14. Because he

fails to support his contention with relevant legal argument or citation to authority, this Court may decline to consider it. See DeHeer, 60 Wn.2d at 126; Allper, 94 Wn.2d at 467.

Regardless, the Disciplinary Board properly rejected the Hearing Officer's illogical mitigating factor because it clearly conflicted with his factual findings. The Hearing Officer rejected Vanderveen's attempts to dodge the effects of his guilty plea by testifying that he was unaware that he had any obligation to file a cash report regarding the $20,000 cash. FFCL ¶30, 36. Instead, the Hearing Officer found that Vanderveen knew of the cash reporting requirement, and intended not to file the report. Id. However, in a legal conclusion that makes no sense, the Hearing Officer relied on the fact that Vanderveen's conviction was based on a guilty plea rather than a jury verdict. FFCL ¶40. Notably, Vanderveen never even testified or argued that he misunderstood the definition of "willfulness" when he entered his guilty plea. TR 201-02, 473.

The Board properly struck the Hearing Officer's conclusion in FFCL ¶40.

b. The Board Properly Struck the Unsupported Mitigating Factor of Character or Reputation.

The Hearing Officer applied the mitigating factor of character and reputation, which the Board struck because "[t]he record does not contain

evidence regarding [Vanderveen's] character or reputation." Board Op. at 4. Vanderveen challenges the Board's decision. BR 22-23.

The Board properly found that no evidence supported this mitigating factor. Vanderveen called no witnesses to testify on his behalf, other than himself. TR 334-545. Vanderveen offered no evidence of his good character or his good reputation. Id. Vanderveen never argued at hearing that his sanction should be mitigated on the basis of character or reputation. TR 686-88. Accordingly, the Association had no reason or opportunity to consider whether rebuttal evidence could or should be offered.

Indeed, the evidence at hearing contradicts a finding that Vanderveen has good character or a good reputation. First, Vanderveen committed a crime of dishonesty. Knowing of his obligation to file a cash report and intending not to file it, Vanderveen instead took the cash, hid it in his home safe, and failed to record it on his books and records. Second, Vanderveen's involvement with major drug dealers – and his commission of the crime of failing to report the cash he received for representing one of the drug dealers – has been a source of significant publicity (TR 202-06; EX 28-46), which the Hearing Officer did not even mention in his findings. This evidence contradicts the Hearing Officer's unsupported finding.

Instead, the Hearing Officer, on his own, asserted that because Vanderveen had been a pro tem judge, he must have had a good character or good reputation. Although use of the Washington Rules of Evidence (ER) is not mandatory in disciplinary proceedings, they may be used as guidelines. ELC 10.14(d). Under those rules, proof of character ordinarily must be made by testimony as to reputation. ER 405(a) does not permit proof of character in the form of an opinion. State v. Mercer-Drummer, 128 Wn. App. 625, 632, 116 P.3d 454 (2005), review denied, 156 Wn.2d 1038, 134 P.3d 233 (2006). Accordingly, evidence that Vanderveen was a pro tem judge would not be admissible if offered for the purpose of establishing that the person or persons who made the decision to hire him had a good opinion of Vanderveen's character. Under such circumstances, allowing a Hearing Officer to make such an inference where there is no direct testimony of good character or reputation is unwarranted.

Finally, where, as here, a respondent lawyer is being sanctioned for criminal conduct not directly related to his professional conduct, the lawyer's reputation for honesty or competence is not a mitigating factor. See Curran, 115 Wn.2d at 774; In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 497 n.15, 998 P.2d 833 (2000); In re Disciplinary Proceeding Against McGrath, 98 Wn.2d 337, 344-45, 655

P.2d 232 (1982).

c. The Board Properly Upheld the Hearing Officer's Decision Not To Apply the Unsupported Mitigating Factor of Other Penalties or Sanctions.

Both the Hearing Officer and the Disciplinary Board concluded that the mitigating factor of "other penalties or sanctions" (ABA Standards § 9.32(k)) is inapplicable. FFCL ¶39; Board Op. at 1. Vanderveen claims they erred. BR 23.

The Hearing Officer and Disciplinary Board properly gave no weight to this mitigating factor since Vanderveen is being sanctioned here for the same criminal conduct that was the subject of the criminal sentence. This decision is especially compelling because Vanderveen's conduct indicates that his criminal conviction did not fully impress upon him the seriousness of his crime. During the course of the criminal proceedings Vanderveen sought sentencing leniency by asserting that he was agreeing to the sanction of disbarment in the disciplinary proceedings, and later, while serving his sentence, he willfully failed to abide by the terms of his sentence by removing his ankle bracelet prematurely. TR 484-85, 500-01.

The issue of whether a criminal sentence should be considered as a mitigating factor was recently resolved by the Washington Supreme Court in Day, 162 Wn.2d at 549 (finding "no error with the finding of the

hearing officer and the Board that the factor of other penalties and sanction did not mitigate Day's sanction") and Perez-Pena, 161 Wn.2d at 835-36 (holding that Perez-Pena's municipal court punishment does not mitigate his sanction, overturning ruling of the hearing officer and Board on the issue). In Perez-Pena, this Court commented:

> In *Haley*, we rejected the proposition that disciplinary proceedings are a punishment scheme, noting that "'our primary concern is with protecting the public and deterring other lawyers from similar misconduct.'"

Id. (citing In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 338 n.10, 126 P.3d 1262 (2006)).

When a lawyer is convicted of a crime, the purpose of disciplinary sanctions is to protect the public and maintain confidence in the profession. McGrath, 98 Wn.2d at 344-46. It would frustrate that purpose to mitigate the sanction when the crime is so serious that it results in a prison sentence. Indeed, the McGrath court cited the severity of the criminal sanction as a factor supporting disbarment in that case. Id. at 344.

d. The Board Properly Concluded That the Other Mitigating Factors Did Not Warrant A Decrease In Sanction.

The remaining mitigating factors – remorse and cooperative attitude towards proceedings (FFCL ¶¶28, 39) – are weak at best and do not justify a mitigation of the presumptive sanction.

True remorse is demonstrated by "truthfully and frankly testify[ing] about the events" which led to conviction, and a "positive and constructive attitude toward his punishment." In re Disciplinary Proceeding Against Egger, 93 Wn.2d 706, 709, 611 P.2d 1260 (1980) (reinstatement proceeding following respondent's disbarment for felonies involving possession of money stolen from a bank). Under the facts of this case, little weight should be afforded the mitigating factor of remorse. In his testimony, Vanderveen attempted to evade the effects of his guilty plea entered under penalty of perjury by claiming that he did not even know of the reporting requirement. TR 461, 467. While Vanderveen expressed some remorse regarding the choices he made in advising Cornett, he never indicated any real remorse for having committed his crime. TR 488-90. Vanderveen's professed remorse at his criminal sentencing, which he attempted to underscore by asserting that he was agreeing to disbarment, TR 500-01, certainly can be called into question by his defiance of his sentence and his probation officer when he cut off his ankle bracelet before the completion of his home detention. TR 484-85.

No weight should be afforded the mitigating factor of full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Attorneys are, and should be, expected to cooperate with the

discipline process as part of their professional obligations to the public and the self-regulatory system. In In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 721, 72 P.3d 173 (2003), this Court stated, "An attorney is expected to cooperate fully with the discipline process and should not be rewarded for 'coming clean' after lying in the disciplinary proceedings. '[C]ooperating with the disciplinary proceedings is not a mitigating factor, even though lack of cooperation may be an aggravating factor.'" Id. (quoting In re Disciplinary Proceeding Against Huddleston, 137 Wn.2d 560, 579, 974 P.2d 325 (1999)). While the Court made clear that cooperation with the disciplinary proceedings may be an appropriate mitigating factor in "some" cases, In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671, 686, 161 P.3d 333 (2007), it only applies "in situations where an attorney goes above and beyond the compliance required in a disciplinary investigation or proceeding." In re Disciplinary Proceeding Against Trejo, No. 200,477-6, 2008 WL 2390338, at *13 (Wash. June 12, 2008). Here, Vanderveen has adduced no evidence of cooperation that goes beyond that required under the ELC, nor did the Hearing Officer make any findings in that regard. FFCL ¶28.

2. The Remaining "Noble" Factors Support the Board's Recommendation.

In determining sanction, the Court also considers the two remaining "Noble" factors of unanimity and proportionality. "The court will generally adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision." Haley, 156 Wn.2d at 339.

a. The Board Voted Overwhelmingly (10-1) In Favor of Disbarment.

The Court gives "great deference to the decisions of a unanimous Board." In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 469, 120 P.3d 550 (2005). Such deference is based on the Board's "unique experience and perspective in the administration of sanctions." Egger, 152 Wn.2d at 404 (quotations omitted). Also, for this reason the Board's sanction recommendation is entitled to greater weight than that of the hearing officer. Cohen II, 150 Wn.2d at 754. Here, the Board's vote was 10-1 in favor of disbarment. In a case involving a Board vote of 11-1, the Court found the Board sufficiently unanimous that "we should hesitate to grant a lesser sanction." Id. at 763.

b. Vanderveen Concedes That He Cannot Prove That Disbarment Is Disproportionate for His Felony Conviction.

In proportionality review, the Court compares the case at hand with "similarly situated cases in which the same sanction was either approved or disapproved." In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 97, 101 P.3d 88 (2004) (quotation omitted). "[T]he attorney facing discipline bears the burden of bringing cases to the court's attention that demonstrate the disproportionality of the sanction imposed." Cohen II, 150 Wn.2d at 763; see In re Disciplinary Proceeding Against Blanchard, 158 Wn.2d 317, 338, 144 P.3d 286 (2006).

The Board recognized that proportionality in this case does not provide a basis for decreasing the sanction. Board Op. at 5. While Washington clearly has no per se rule requiring disbarment upon conviction of a felony, McGrath, 98 Wn.2d at 344, it is unsurprising that lawyers who commit felonies almost always are disbarred. When deciding the appropriate sanction in a case where a lawyer has committed a crime, this Court considers the damage to the integrity of the profession. See In re Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 872, 846 P.2d 1330 (1993); see generally, ABA Standards at 36 ("[p]ublic confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct"). In Petersen, the Court emphasized

that it was ordering disbarment because "violations of the law by lawyers contribute to the erosion of respect for legal institutions and the law." 120 Wn.2d at 872; see also In re Disciplinary Proceeding Against Pence, 91 Wn.2d 1, 2, 586 P.2d 850 (1978) ("conviction of a felony generally begets disbarment").

Vanderveen concedes that he cannot invoke proportionality here to justify disregarding the appropriate sanction under the ABA Standards, because there are no reported cases involving an analogous criminal conviction.[16] BR 22.

Thus, he has failed to meet his burden to demonstrate the sanction is disproportionate. The Board's recommendations should be affirmed.

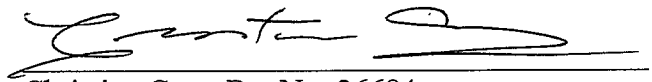
[16] For purposes of proportionality, there are no contested Washington cases regarding Vanderveen's felony conviction statute, 31 U.S.C. § 5331, and none for other convictions under Title 31 of the United States Code.

IV. CONCLUSION

Disbarment is appropriate to "protect the public" and to maintain "respect for the honor and dignity of the legal profession." McGrath, 98 Wn.2d at 344-45. The Court should affirm the Disciplinary Board's recommendation that Vanderveen be disbarred.

RESPECTFULLY SUBMITTED this 27th day of June, 2008.

WASHINGTON STATE BAR ASSOCIATION



Christine Gray, Bar No. 26684
Senior Disciplinary Counsel

APPENDIX A

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re: A. MARK VANDERVEEN, Lawyer (WSBA # 18616).	Public No.: 05#00078 HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Pursuant to ELC 10.13, this matter came on for hearing before Hearing Officer Peter A. Matty in Seattle, Washington on January 8 through 12, 2007, and on April 5, 2007, for announcement of the hearing officer's decision. Respondent attorney A. Mark Vanderveen appeared in person with his attorney Kurt M. Bulmer. Senior Disciplinary Counsel Christine Gray represented the Washington State Bar Association (WSBA).

FORMAL COMPLAINT

The First Amended Formal Complaint filed by the WSBA charged the following five counts of misconduct:

Count 1: By assisting Mr. Kesling and/or Mr. White in determining who had removed the marijuana from the Woodinville barn and/or in determining whether Mr. Cornett was cooperating with law enforcement authorities, Respondent violated RPC 8.4(b) (by violating 21 U.S.C. §846).

Count 2: By intentionally engaging in one or more of the telephone conversations set forth above, Respondent violated RPC 8.4(b) (by violating 21 U.S.C. §843(b)).

Count 3: By representing and/or advising Mr. Cornett when his representation and/or advice was materially limited by his responsibilities to Mr. Kesling and/or Mr. White and/or by his own interests, Respondent violated RPC 1.7(b), RPC 8.4(a) and/or RPC 8.4(d).

Count 4: By accepting payment from Mr. White and/or Mr. Kesling for representation of Mr. Cornett under circumstances that interfered with Respondent's independence of professional judgment, Respondent violated RPC 1.8(f), RPC 8.4(a) and/or RPC 8.4(d).

Count 5: By committing the acts that resulted in the guilty plea to failing to file a currency transaction report (IRS Form 8300), as set forth above, Respondent violated RPC 8.4(b), RPC 8.4(c), and/or RPC 8.4(i).

NOW THEREFORE, based on the pleadings in this case and the testimony and exhibits entered at hearing as well as argument of counsel, the Hearing Officer makes the following:

FINDINGS OF FACT

To the extent that any Conclusions of Law, Sanctions Analysis or Recommendation constitute Findings of Fact, they are incorporated herein.

1. Respondent A. Mark Vanderveen was admitted to the practice of law in the State of Washington on June 5, 1989. Pursuant to ELC 7.1 he was suspended from the practice of law on July 28, 2005, pending final disposition of this proceeding. He remains suspended at this time.

2. In February 2005, Robert V. Kesling, Wesley Cornett, Douglas Spink and/or others were distributing cocaine and marijuana. Cornett and Spink were subordinate to Kesling. Cornett was the tenant of a house in Woodinville, WA where marijuana was stored in a trailer in the garage.

3. On February 28, 2005, Cornett, acting as courier for Kesling, met with Spink in Everett, Washington and delivered to Spink several suitcases containing approximately 149 kilograms of cocaine. Spink was to deliver the cocaine to others. Later that same day federal

law enforcement authorities arrested Spink and seized the cocaine.

4. On March 1, 2005, federal law enforcement authorities arrested Cornett, who agreed to cooperate with the ongoing federal investigation. On March 1, 2005, based upon information provided to them by Cornett, federal law enforcement authorities seized the trailer from the garage of the Woodinville house. The trailer contained more than 450 pounds of packaged marijuana.

5. Attorney James L. White represented Kesling. On March 1, 2005, White asked Respondent if he would be willing to represent Cornett. White and Respondent had worked with each other in the past as counsel for co-defendants in the same matter.

6. After discussions with Cornett's girlfriend and with Cornett, Respondent agreed to do so. However, unbeknownst to Respondent, Cornett was already represented by a federal public defender. At all times material hereto, Respondent did not know that his alleged representation of Cornett was a sham designed by federal prosecutors to keep Cornett viable as an informant.

7. During his first meeting with Cornett, Respondent made Cornett aware that his attorney fees were being paid by a third party. Respondent made clear to Cornett that his (Respondent's) only responsibility was to Cornett and that Cornett was his client. Cornett consented to his fees being paid by a third party. Respondent's acceptance of the funds from a third party did not interfere with his independent, professional judgment while representing Cornett..

8. In March 2005, Respondent received two payments of $10,000.00 in cash from White as a fee for Respondent's services to represent Cornett. Respondent failed to file a "Report of Cash Payments Over $10,000 Received in a Trade of Business" (IRS Form 8300)

with the Internal Revenue Service, as required by law.

9. In early March 2005, Kesling learned that the trailer containing marijuana was missing from the Woodinville house, but was unaware of who had removed the marijuana. Kesling wanted to learn who had been removed the marijuana. Kesling was concerned that someone had taken the trailer either to get the drugs and/or money that was in the trailer or in cooperation with the federal drug authorities. White asked Respondent to help prove that Cornett was not cooperating with federal authorities or had not taken the trailer. Respondent believed that it was in Cornett's best interests to do so.

10. Subsequently, Respondent asked Cornett about the missing marijuana. Cornett insisted he knew nothing about its disappearance and advised Respondent that Kesling was very dangerous and could do him (Cornett) serious physical harm. Cornett advised Respondent that it was crucial that Kesling not think that Cornett was an informant and advised Respondent that in fact he was not an informant. Respondent believed that Kesling was very dangerous, that Cornett knew nothing about the missing marijuana and that Cornett was not an informant.

11. On March 8, 2005, Respondent met with Cornett. During this meeting. Respondent discussed the missing marijuana with Cornett. Cornett continued to deny that he knew anything about it and continued to deny that he was a federal informant.

12. During this meeting and others, Respondent attempted to determine the scope of Cornett's participation in the distribution of drugs in order to evaluate Cornett's criminal liability. As part of that process, Respondent also contact the U.S. Attorney's Office in order to ascertain Cornett's liability and to help in determining whether Cornett should offer to cooperate in the investigation in order to get better treatment by the federal prosecutor.

13. Prior to meeting with Cornett on March 8, 2005, Respondent advised White of the time the meeting would take place. Respondent knew White wanted to have Cornett followed when he left the meeting, but didn't know White himself would do so. When Cornett left Respondent's office on March 8, 2005, White followed Cornett, but after a time lost him.

14. Although Respondent did not tell Cornett that he might be followed, Respondent's actions were taken with the intent to assist Cornett in proving to Kesling that Cornett was not cooperating with law enforcement authorities and/or that Cornett had not taken the trailer. Respondent acted for the benefit of his client.

15. On March 9, 2005, during a telephone conversation, Respondent told Cornett that he had spoken to White and had told White that Cornett knew nothing about the missing marijuana. Kesling wanted to meet with Cornett and Respondent felt this might reduce Kesling's suspicions regarding Cornett. Cornett agreed. Respondent was concerned that the meeting place be safe. A meeting was set up at White's office and Respondent communicated the location to Cornett. Cornett met alone with Kesling at White's office.

16. During a March 17, 2005, telephone conversation, Respondent advised Cornett that Kesling wanted Cornett to take a polygraph examination regarding who took the trailer. Cornett agreed to take the polygraph. Respondent arranged for the polygraph and the examination was set for March 22, 2005.

17. On March 20, 2005, Cornett met with Kesling. They discussed the missing marijuana. During the conversation, Kesling spoke of "killing" the person who took it.

18. On March 21, 2005, Cornett telephoned Respondent. During the conversation, they discussed Cornett taking the polygraph examination. Cornett had consistently denied any

knowledge of the missing trailer and Respondent thought that by taking the polygraph Cornett could convince Kesling accordingly. Respondent told Cornett that in order to provide additional protection for Cornett, Respondent would directly hire the polygraph examiner and instruct the polygraph examiner to give the results only to Respondent. Respondent indicated that "if we get a bad test" he could talk to the polygraph examiner about trying it again, clarifying the test or rephrasing the questions. Cornett said he would take the exam and Respondent made the agreed upon arrangements.

19. The next day, March 23, 2005, Cornett went to the polygrapher's office. Kesling and White were there. White then met with the polygrapher outside of the presence of Cornett and Kesling. When White returned a few minutes later, he informed Cornett and Kesling that the polygrapher was not willing to administer the polygraph and the exam was cancelled.

20. During subsequent telephone conversations with Respondent on March 28, 2005, Cornett indicated that he did not want to take the polygraph, and questioned whether it was necessary. Respondent indicated that if Cornett did not want to take the polygraph he would tell White that the exam was not going to happen.

21. Respondent believed that Cornett had nothing to hide by taking the polygraph and at the same time believed Cornett was fearful of physical harm by Kesling. Cornett sent mixed messages to Respondent by saying at other times he didn't think Kesling would actually harm him and by going back and forth on whether he would take the polygraph. When Respondent arranged for the polygraph to be taken privately with the results only going to him, he acted appropriately and in his client's best interest.

22. Respondent met with various law enforcement officials at the U.S. Attorney's

office on May 17, 2005, to discuss an alleged conspiracy between Respondent, White and Kesling. Any inconsistencies between what allegedly was said at that meeting by Respondent and Respondent's testimony in these proceedings were insignificant and minuscule. Testimony during this disciplinary proceeding from Agent Caldwell, who was present at the May 17 meeting, was based on his notes. While the notes certainly were not fabricated, the testimony was not persuasive The meeting was not recorded and the notes were not an all inclusive account of what transpired at the meeting. Agent Caldwell's notes were apparently taken for the purpose of assisting him in preparation of a report to support prosecution of Respondent,

23. On July 22, 2005, Respondent pled guilty as charged in Count 1 of the Information filed in *United States v. A. Mark Vanderveen*, Cause No. CR05-0283JCC (W.D. Wash.), to the felony crime of failure to file a currency transaction report (Form 8300), in violation of Title 31, United States Code, Sections 5331(a) and 5322. The Plea Agreement was admitted in this proceeding as Exhibit 21.

24. Having failed to file Form 8300, Respondent could not and did not make any misrepresentation regarding it. Nor, because the form was not filed, did he cause deceit or commit fraud the form was not filed.

25. Respondent's conduct and advice in regard Cornett and his communications to White were what one would expect from a lawyer who thought Cornett was his client. Respondent did what any lawyer in his position should do acting in the best interests of his client.

26. Respondent clearly understood that his responsibilities were to Cornett, and no one else. He demonstrated that fact consistently. At one point, after Cornett told him that

others were trying to persuade him to flee to Mexico, Respondent telephoned White and told him they would all have to part ways unless White or others stopped telling Cornett to go to Mexico.

27. The allegation that Respondent was part of a conspiracy was not proven.

28. Respondent has no prior disciplinary record. He was cooperative during the hearing, was very candid in answering questions and has shown considerable remorse.

29. Respondent's character is good and prior to his conviction for failing to file Form 8300, he had a very good reputation. He was a judge pro tem and had been a successful practitioner for many years.

30. The statute under which Respondent pled guilty requires a "willful" violation. "Willful" in this context includes "intentional" as a matter of law. (See discussion of the *Ratzlaf* case in Paragraph 36 below.)

CONCLUSIONS OF LAW

To the extent any Finding of Fact, Sanctions Analysis and Recommendation constitutes a Conclusion of Law, they are incorporated herein.

31. Count 1 - The Association failed to prove by a clear preponderance of the evidence that Respondent participated in a conspiracy or conspired to violate the law contrary to RPC 8.4(b). Count 1 should be dismissed.

32. Count 2 – The Association failed to prove by a clear preponderance of the evidence that Respondent conspired by telephone to violate the law contrary to RPC 8.4(b). Count 2 should be dismissed.

33. Count 3 – The Association failed to prove by a clear preponderance of the evidence that Respondent was limited in his representation of and in his advice to Cornett in

violation of RPC 1.7(b) or that he attempted to do so in violation of RPC 8.4(a). The Association failed to prove by a clear preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(d) or that he attempted to do so in violation of RPC 8.4(a). Count 3 should be dismissed.

34. Count 4 – The Association failed to prove by a clear preponderance of the evidence that Respondent's acceptance of money from White interfered with Respondent's professional independence in violation of RPC 1.8(f) or that he attempted to do so in violation of RPC 8.4(a). The Association failed to prove by a clear preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(d) or that he attempted to do so in violation of RPC 8.4(a). Count 4 should be dismissed.

35. Count 5 – The Association proved by a clear preponderance of the evidence that Respondent's conviction for failing to file Form 8300 was an act which adversely reflects on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of RPC 8.4(b). This conclusion is an easy one to reach, because RPC 8.4(b) merely requires that there be an "adverse" reflection and does not require that it be serious, significant or substantial. The Association proved by a clear preponderance of the evidence that Respondent's failure to file Form 8300 violated RPC 8.4(c), because it constituted "dishonesty" in that it reflected untrustworthiness and a lack of integrity. However, Respondent's conduct did not constitute "misrepresentation", "deceit" or "fraud" within the meaning of RPC 8.4(c).. The Association failed to prove by a clear preponderance of the evidence that Respondent's conduct violated RPC 8.4(i), because it did not involve moral turpitude, corruption, an unjustified act of assault or other act which reflects disregard for the law. Count 5 should be dismissed as to RPC 8.4(i).

36. Respondent's conviction under 21 U.S.C. § 846 was based on a violation of § 5331(a). That section requires "willful" conduct on the part of the defendant. The case of *Ratzlaf v. US*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) leads me to the conclusion that "willful" conduct under the statute also means "intentional" Conduct. Accordingly, pursuant to this legal analysis, I am constrained to conclude that for purposes of his conviction, Respondent knew of the reporting requirement and intentionally failed to file Form 8300 .

SANCTIONS ANALYSIS

37. The presumptive sanction for the violation of RPC 8.4(b) and RPC 8.4(c) under Count 5 is ABA Standard 5.11(b):

> 5.0 **Violations of Duties Owed to the Public**
>
> 5.1 **Failure to Maintain Personal Integrity**
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> 5.11 Disbarment is generally appropriate when:
>
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

38. The following aggravating factor applies under Standard 9.22:

(i) substantial experience in the practice of law.

39. The following mitigating factors apply under Standard 9.32:

(a) absence of a prior disciplinary record;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings

(g) character or reputation

(l) remorse;

40. The mitigating factors set forth in Standard 9.32 are not exclusive. Standard 9.31 provides that mitigating circumstances may include "...any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Such considerations or factors exists in this case.

It is essential to understand that *Ratzlaf* held that in order to convict for failure to file Form 8300, the jury must be instructed that they have to find that Defendant not only acted "willfully", i.e. with knowledge of the reporting requirement, but that he also acted with a specific intent to commit the crime. Respondent, however was convicted pursuant to a plea agreement. He was not found guilty after a trial by a jury properly instructed that "willfulness" means both a knowledge of the reporting requirement and a specific intent to not file Form 8300. The plea agreement in Respondent's matter simply states that one element of the crime of failing to file Form 8300 is that the Defendant acted "willfully". The Plea Agreement does not state that "intentionally" is an element of the crime and it does not state that "willfully" is interpreted to include "intentionally". Thus, while Responednt certainly pled guilty to acting "willfully", he did not plead guilty to acting "intentionally".

41. Section 1.1 of the ABA Standards states:

> The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged,
>
> will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.

I am also mindful of our Supreme Court's decision in *In re Greenlee*, 98 Wn.2d 786, 658 P.2d 1 (1983) stating:

> Generally speaking, the purpose of attorney discipline is to protect The public from future misconduct of attorneys, and to preserve public confidence in the legal system. In this regard several considerations have been deemed important: (1) the seriousness and circumstances of the offense; (2) the avoidance of repetition; (3) the deterrent effect upon other attorneys; (4) assurance that those who seek legal services will be insulated from unprofessional conduct; and finally, (5) the maintaining of respect for the legal profession.
>
> Without detracting from the importance of the foregoing considerations we must , in imposing the ultimate discipline, make a disposition that is appropriate to the facts and circumstances of th individual case. discipline should not be imposed in a vacuum. *At 787,788. Citations omitted*

In *In Re Livesey*, 85 Wn.2d 189, 532 P.2d 274 (1975), the Court emphasized that:

> The challenge for this court is to fashion a suitable remedy in each case before us to accomplish these goals and ensure that individualized justice is dispensed. The action appropriate in a given case can only be determined by its particular facts and circumstances. *At 193. Citations omitted*

42. When I consider the particular facts and circumstances of this case and the need to ensure that individualized justice is dispensed, justice that is not imposed in a vacuum, I believe that the purposes of lawyer discipline, as set forth in the ABA Standards and as articulated by our Stat Supreme Court, are properly served by recommending a sanction less severe than disbarment.

RECOMMENDATION

THEREFORE, having made his Findings of Fact and Conclusions of Law, the Hearing Officer makes the following recommendations:

43. Having found that the WSBA has failed to meet its burden of proof in regard Counts 1 through 4 and with regard to the alleged violation of RPC 8.4(i) set forth in Count 5, I recommended that they be dismissed.

44. Having found that the acts that resulted in Respondent's guilty plea to failing to file IRS Form 8300 constitute a violation of RPC 8.4(b) as alleged in Count 5 and that such acts and guilty plea constitute conduct involving dishonesty (but not fraud, deceit or misrepresentation) in violation of RPC 8.4(c) as alleged in Count 5, and after considering the mitigating and aggravating factors, the particular facts and circumstances of this case and the purposes of lawyer discipline, I recommend that Respondent be suspended for three years, with credit for the time he has been previously suspended pursuant to ELC 7.1.

Dated this 28th day of June, 2007.

Peter A. Matty
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the ~~F/F, C/L~~ + HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer, ~~Respondent~~/Respondent's Counsel at 240 Belmont #E43, Seattle WA 98102 by ~~Certified~~/first class mail, postage prepaid on the 3 day of July, 2007.

Bobby Creed
Clerk/~~Counsel~~ to the Disciplinary Board

APPENDIX B

FILED

JAN 25 2008

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **A. MARK VANDERVEEN**, Lawyer (WSBA No. 18616).	Proceeding No. 05#00078 DISCIPLINARY BOARD ORDER MODIFYING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its November 30, 2007 meeting on automatic review of Hearing Officer Peter A. Matty's decision recommending a three year suspension following a hearing.

Having reviewed the documents designated by the parties, the briefs and the applicable case law and rules, and having heard oral argument:

IT IS HEREBY ORDERED THAT the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation are approved with the following amendments. The

ORIGINAL

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sanction is increased to disbarment.[1].

FINDINGS OF FACT

FINDING 25

This finding is stricken because it is not supported by the evidence in the record and contains an incorrect conclusion of law.[2] The record establishes that Mr. Vanderveen knew that Mr. White intended to follow his client, Mr. Cornett, and that Mr. Vanderveen did not disclose this information to Mr. Cornett. The record states as follows:

> Q: And you knew at the time that White intended to follow Cornett or to have Cornett followed when he left your office?
>
> A: Yes, we had discussed that. (TR 66, lines 17-20)
>
> A: Mr. White was concerned that Mr. Cornett might be cooperating. Mr. White was more concerned that Mr. Cornett had taken the trailer himself and had either sold the contents of the trailer and taken the money or had hidden the trailer somewhere so that if he went to prison for a long period of time when he got out he would have his own self-created retirement account, so to speak.

---

[1] The vote on this matter was 10-1. Those voting in the majority were Andrews, Carlson, Cena, Coppinger Carter, Darst, Kuznetz, Madden, Meehan, Meyers and Montez. Urena voted in the minority. Mr. Fine recused from this matter and did not participate. He was not present during the argument, deliberations or voting.

[2] Original Finding 25 stated, "Respondent's conduct and advice in regard Cornett and his communications to White were what one would expect from a lawyer who thought Cornett was his client. Respondent did what any lawyer in his position should do acting in the best interests of his client."

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Q: And during this meeting of March 8, 2005 you do not tell Mr. Cornett that Mr. White was concerned that Cornett was cooperating, did you?

A: Apparently not. (TR 74 line 15-TR75 line 1)

Q: Now, during this meeting on March 8th, 2005, you never informed Mr. Cornett that Mr. White was going to follow him when he left your office?

A: I did not. (TR 83, lines 8-14)

Q: And at the conclusion of this March 8th meeting after Mr. Cornett left your office you called Mr. White right away, isn't that right?

A: Yes.

Q: And the purpose of your calling Mr. White right away was to alert Mr. White so that he could follow Mr. Cornett?

A: That's true. (TR 83 line 22-TR84 line 4)

This evidence does not support the Hearing Officer's Finding of Fact 25. The statement "Respondent did what any lawyer in his position should do acting in the best interests of his client" is a conclusion of law that is not supported by the facts in the record.

FINDING 26

This finding is amended as follows:

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Respondent ~~clearly~~ understood that his responsibilities were to Cornett, and no one else. ~~He demonstrated that fact consistently~~. At one point, after Cornett told him that others were trying to persuade him to flee to Mexico, Respondent telephoned White and told him they would all have to part ways unless White or others stopped telling Cornett to go to Mexico.

The record does not support a finding that Respondent clearly understood his responsibilities were only to Cornett or that he demonstrated that fact consistently. Respondent actively assisted White in his attempt to follow Mr. Cornett without his client's knowledge.

FINDING 29

This finding is stricken[3]. There is no evidence in the record regarding Respondent's character or reputation.

CONCLUSION 39

The mitigating factor of character or reputation is stricken. The record does not contain evidence regarding Respondent's character or reputation.

[3] Original Finding 29 stated, "Respondent's character is good and prior to his conviction for failing to file Form 3800, he had a very good reputation. He was a judge pro tem and had been a successful practitioner for many years."

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CONCLUSION 40

Conclusion 40 is stricken[4]. Conclusion of Law 40 conflicts directly with Findings of Fact 30 and 36. In both Findings 30 and 36, the Hearing Officer correctly found that Respondent's mental state for purposes of the disciplinary hearing was intentional. In Conclusion of Law 40, the Hearing Officer stated that Respondent's mental state was not intentional. The Board agrees with Findings 30 and 36 that Respondent's mental state for purposes of the disciplinary hearing was intentional.

SANCTION ANALYSIS

The Board agrees with the hearing officer that the presumptive sanction is disbarment under ABA Standard 5.11(b). The Board agrees with the aggravating factor of (i) substantial experience in the practice of law. The Board agrees with the mitigating factors of (a) absence of prior disciplinary record, full and free disclosure to the disciplinary board, and remorse. The aggravating and mitigating factors do not justify decreasing the sanction from disbarment to suspension. Although this is the most severe sanction, it is proportional to the sanctions imposed in analogous cases. The Board recommends that Mr. Vanderveen be disbarred.

---

[4] Original conclusion 40 stated: "The mitigating factors set forth in Standard 9.32 are not exclusive. Standard 9.31 provides that mitigating circumstances may include' . . any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Such considerations or factors exists in this case. It is essential to understand that *Ratzlaf* held that in order to convict for failure to file Form 8300, the jury must be instructed that they have to find that Defendant not only acted "willfully", i.e. with knowledge of the reporting requirement, but that he also acted with a specific intent to commit the crime. Respondent, however, was convicted pursuant to a plea agreement. He was not found guilty after a trial by a jury properly instructed that "willfulness" means both a knowledge of the reporting requirements and a specific intent to not file Form 8300. The plea agreement in Respondent's matter simply states that one element of the crime of failing to file Form 8300 is that the Defendant acted "willfully." The Plea Agreement does not state that 'intentionally' is an element of the crime and it does not state that 'willfully' is interpreted to include 'intentionally'. Thus, while Respondent certainly pled guilty to acting 'willfully', he did not plead guilty to acting 'intentionally."

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Dated this 25th day of January, 2008.

William Carlson, Vice Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order Amending HO Decision to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer, Respondent/Respondent's Counsel at 740 Belmont PI E #2, Seattle, WA 98102, by ~~Certified~~/first class mail, postage prepaid on the 25 day of January, 2008

Clerk/Counsel to the Disciplinary Board

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APPENDIX C

§ 5331. Reports relating to coins and currency received in nonfinancial trade or business

(a) Coin and currency receipts of more than $10,000.--Any person--

(1) who is engaged in a trade or business; and

(2) who, in the course of such trade or business, receives more than $10,000 in coins or currency in 1 transaction (or 2 or more related transactions),

shall file a report described in subsection (b) with respect to such transaction (or related transactions) with the Financial Crimes Enforcement Network at such time and in such manner as the Secretary may, by regulation, prescribe.

. . . .

§ 5322. Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

. . . .